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780216—48

# In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 579

SAM LEE GARLAND, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 157–158) is reported in 164 F. (2d) 487. The opinion of the District Court (R. 148–151) is unreported.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 4, 1947 (R. 158). A petition for rehearing was denied January 7, 1948 (R. 168). The petition for a writ of certiorari was filed February 6, 1948, and served February 24, 1948.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. 347 (a)).

## QUESTIONS PRESENTED

1. Whether the petitioner was engaged in operations as a broker of transportation, within the meaning of Section 203 (a) (18) of the Interstate Commerce Act (49 U. S. C. 303 (a) 18), and whether his operations were subject to regulation by the Interstate Commerce Commission.

2. Whether the Interstate Commerce Commission was authorized to remove the exemption contained in Section 203 (b) (9) of the Interstate Commerce Act applicable to casual, occasional, and reciprocal transportation of passengers by motor vehicle, so as to subject such transportation to regulation when arranged for by any person for compensation or as a regular occupation or business.

## STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are Sections 203 (a) (18), 203 (b) (9), and 211 (a), 49 U. S. C. 303 (a) (18), 303 (b) (9), and 311 (a). These are set forth in the text, *infra*, pp. 6–8.

## STATEMENT

Petitioner owns and operates three so-called "travel bureaus" at different locations in Dallas, Texas. The travel bureaus are known as Rock House No. 1, located at 715 Commerce Street,

Union Rock House No. 2, located at 1513 Jackson Street, and Rock House No. 3, located at 600 Commerce Street (R. 49). Respectively, they are situated near the railroad and bus stations (R. 68, 69). At the period covered by the evidence, each travel bureau office prominently displayed signs advertising travel to various destinations (R. 58, Exs. 1–9, incl.), and one of them had a highway map painted on the front window of the building outlining highways leading in different directions from Dallas and naming principal cities in Texas and adjoining states (R. 64, Ex. 9). Each office was furnished with seats, counters, and desks somewhat like a waiting room (R. 49, 50, 67).

Petitioner personally assisted in the operation of the travel bureau located at 715 Commerce Street and had a number of employees in the different locations (R. 49, 50). Petitioner advertised travel service to all points daily by means of the Dallas telephone directory (R. 122–124, Exs. 15, 16, 17, 18), and prospective travelers calling at his offices were furnished business cards advertising travel information service (R. 92, Ex. 12, R. 99, Ex. 13, R. 106, Ex. 14).

Petitioner claims that he does not arrange transportation, but only furnishes information to prospective passengers and car owners who desire to transport passengers (R. 131). He further claims that he does not solicit travel business to points outside Texas (R. 136), but prospective travelers

who called at his places of business were quoted fares for transportation from Dallas to Tulsa, Oklahoma (R. 92), Omaha, Nebraska (R. 98), Denver, Colorado (R. 105), New Orleans, Louisiana (R. 110) and Wichitta, Kansas (R. 118). A passenger who used petitioner's services in making a trip in interstate commerce called one of his offices by telephone and was informed in response to his inquiry that transportation would be provided from Dallas to Oklahoma City, Oklahoma. The passenger subsequemtly went to the travel bureau office and was provided with such transportation, paying the compensation for such transportation to the travel bureau (R. 77–80).

At the times referred to, petitioner had not obtained a license from the Interstate Commerce Commission as a broker of transportation by motor vehicle in interstate commerce as required by Section 211 (a) of the Interstate Commerce Act (49 U. S. C. 311 (a)), and had not filed with the Commission a bond as a broker, as required by Commission regulations prescribed under the Act (R. 126, Ex. 19). Charged by information in seven counts with operating as a broker of motor vehicle transportation without a license, in violation of Section 211 (a), and with so operating without having filed a bond, in violation of said regulations, petitioner was convicted and fined $250 (R. 3–11). He appealed and the judgment of conviction was affirmed *per curiam* by the Circuit Court of Appeals (R. 157–158).

ARGUMENT

Eight separate points are set forth as grounds for the petition for a writ of certiorari. In essence, however, they resolve themselves into only two contentions, namely, that (1) petitioner was not a broker and his operations were not subject to regulation by the Interstate Commerce Commission; and (2) the Commission was not authorized to remove the exemption contained in Section 203 (b) (9) of the Interstate Commerce Act (49 U. S. C. 303 (b) (9)) applicable to casual, occasional, and reciprocal transportation of passengers by motor vehicle, so as to subject such transportation to regulation when arranged for by any person for compensation or as a regular occupation or business.

1. On the question whether his operations were those of a broker, petitioner places his reliance upon two decisions of the Supreme Court of Texas, *Ex Parte Martin,* 127 Tex. Cr. 25, 74 S. W. (2d) 1017, and *Ex Parte Talkington,* 104 S. W. (2d) 495. Those cases, based upon facts somewhat similar to those in the case at bar, were, as the Circuit Court of Appeals pointed out (R. 158), decided under a Texas statute entirely different in its provisions from the Federal statute under which petitioner was prosecuted and convicted.

Under the Interstate Commerce Act (49 U. S. C. 303 (a) (18)), "The term 'broker' means any person not included in the term 'motor carrier' and

not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation."

Section 211 (a) of said Act (49 U. S. C. 311 (a)) provides:

> No person shall for compensation sell or offer for sale transportation subject to this part or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, *unless such person holds a broker's license issued by the Commission to engage in such transactions:* * * * [Italics supplied].

Inasmuch as the evidence clearly shows (and the trial court by convicting him found) that petitioner was offering for sale transportation by motor vehicle in interstate commerce, and holding himself out by advertisement, solicitation and otherwise as one who sold, provided, and arranged for such transportation, there is no room to doubt that his operations were those of a broker subject to the license and bond requirements, unless his operations were exempt from regulation under the exemption provision hereinafter discussed.

In *Martin et al.* v. *United States,* 100 F. (2) 490 (C. C. A. 10), persons shown to have engaged in similar operations were held to be brokers subject to the Act. The Circuit Court of Appeals stated (p. 493):

> Appellants did not transport passengers. They were unlicensed brokers engaged in the business of making arrangements for compensation for transportation of passengers by motor vehicle in interstate commerce. They, therefore, came within the purview of section 211 of the act.

2. Notwithstanding the holding in *Martin et al.* v. *United States, supra,* petitioner urges that the transportation of passengers arranged for by him was "casual, occasional, or reciprocal transportation" under the provisions of Section 203 (b) of the Interstate Commerce Act (49 U. S. C. 303 (b) (9)), and was therefore exempt from regulation by the Commission. The material parts of that section read as follows:

> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * nor, *unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part,* except the provisions of section 204 relative to qualifications and maximum

> hours of service of employees and safety of operation or standards of equipment *apply to:* * * * (9) *the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker,* * * *. [Italics supplied.]

The exemption in the above-quoted provision is obviously inapplicable to petitioner, for two reasons: (1) it does not apply to brokers, and, as shown above under point 1, petitioner is a broker; (2) it does not apply if the Commission finds that it should be removed in order to carry out the national transportation policy, and such a finding has here been made.

In 1940 the Interstate Commerce Commission instituted an investigation into the practices with respect to the casual, occasional, or reciprocal transportation of passengers by motor vehicle in interstate commerce for compensation, for the purpose of determining whether the exemption of such transportation as provided in Section 203 (b) (9) of the Act should be removed. After a number of hearings in which a large number of travel bureau operators intervened, the Commis-

sion issued its order based upon evidence and findings as reported in *Ex Parte No. MC–35,* 33 M. C. C. 69, making applicable all provisions of the Act to casual, occasional, or reciprocal transportation of passengers for compensation when such transportation was sold or offered for sale or provided, procured, or furnished by any person for compensation or as a regular occupation or business. The order, issued May 8, 1942, effective November 1, 1942, and published in 49 CFR, Cum. Supp., 210.1, is as follows:

> *Sec. 210.1 Casual, occasional, or reciprocal transportation of passengers for compensation when such transportation is sold or arranged by anyone for compensation.* The partial exemption from regulation under the provisions of Part II of the Interstate Commerce Act of the casual, occasional, and reciprocal transportation of passengers by motor vehicle in interstate or foreign commerce for compensation as provided in section 203 (b) (9) of the act be, and it is hereby, removed to the extent necessary to make applicable all provisions of Part II of the act to such transportation when sold or offered for sale, or provided or procured or furnished or arranged for, by any person who sells, offers for sale, provides, furnishes, contracts, or arranges for such transportation for compensation or as a regular occupation or business. (Sec. 203 (b) (9) 49 Stat. 546, 54 Sta. 919, 921; 49 U. S. C. 303 (b) (9)).

It thus appears that the Commission, under the express authority delegated to it by the Congress in the exemption provision itself, has removed the exemption to the extent necessary to make all provisions of the Act applicable to such casual, occasional, and reciprocal transportation of passengers when arranged for by any person for compensation as a regular occupation or business. That petitioner was such a person cannot be doubted under the evidence of record.

Petitioner insists, however, that the provision under which the Commission proceeded in so removing said exemption as to such transportation was an unconstitutional delegation of power.

It should first be noted that in *United States et al.* v. *Capital Transit Company,* 325 U. S. 357, the Court upheld an order of the Commission removing a similar exemption and subjecting the transportation involved to regulation. That order was made under the same statutory provisions and standards as the order in the case at bar.

The precise question here involved, whether the Commission was authorized to remove the exemption provision in Section 203 (b) (9), was before the Court in the recent case of *Levin et al.* v. *United States et al.,* 319 U. S. 728. That case originated when, following the Commission's order in *Ex Parte No. MC–35,* a number of travel bureau operators brought suit in the Northern District of Illinois to set aside the order. Their suit was

dismissed by the lower court, which did not file a written opinion. Its findings of fact and conclusions of law were published in 3 Federal Carriers Cases 2297, and the following is quoted from the conclusions:

> 5. The order of the Interstate Commerce Commission entered March 21, 1942, which removes the exemption under said Section 203 (b) (9) of casual, occasional, or reciprocal interstate transportation of passengers for compensation, where such transportation is sold, procured, provided, furnished, or arranged for by a third person intermediary who engages in making such transactions as a regular business or occupation, is within the statutory authority of the Commission, is supported by substantial evidence, and is lawful. Evidence introduced by plaintiffs, at the court hearing, failed to disclose any abuse of discretion on the part of the Commission in refusing to reopen its order of March 21, 1942, for reconsideration and rehearing.

The judgment of the lower court was affirmed *per curiam* on May 17, 1943, 319 U. S. 728, thus settling, adversely to the position taken by petitioner herein, the principal question raised in the instant case.

## CONCLUSION

The decision below is in accord with prior decisions of this Court involving similar questions and there is no conflict of decisions in the lower

courts. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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MARCH 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948